

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Lincolnshire County Council
(reference number: 20 005 479)**

6 July 2021

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Mrs B	The complainant
Mrs C	Her mother

Report summary

Adult Social Care

Mrs B complained that the Council, when arranging care for her mother, Mrs C, in a care home in January 2020, failed to explain or follow its duties under the Care Act regarding the payment of the fees.

Finding

Fault found causing injustice and recommendations made.

Recommendations

To remedy the injustice caused, we recommend the Council:

- provides a further formal apology in writing to Mrs B;
- pays £600 to Mrs B in recognition of the time, trouble and distress she has experienced; and
- completes the changes to its payment processes in line with our previous recommendations as a matter of urgency and reports back to us once it has done so.

The complaint

1. Mrs B complained that the Council, when arranging care for Mrs C in a care home in January 2020, failed to explain or follow its duties under the Care Act regarding the payment of the fees. In particular it:
 - failed to fully explain the options available and the implications of the different options before the care started;
 - failed to offer Mrs B the option of paying the top-up fee and Mrs C's service-user contribution directly to the Council;
 - did not provide a written confirmation of the fee-paying arrangement until April 2020 and then sent three different versions with no explanation;
 - failed to explain or provide information about the deferred payment agreement before the end of the 12-week disregard period;
 - failed to support Mrs B when the care home took duplicate payments for Mrs C's service-user contribution directly from Mrs C's bank account and refused to refund the money for several months; and
 - has not explained to Mrs B when and how the accumulated debt will be repaid when Mrs C's flat is sold.
2. Mrs B says this has caused her significant uncertainty, distress and inconvenience over a prolonged period.

Legal and administrative background

3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

Care Act 2014

4. The Care Act 2014, the Care and Support Statutory Guidance 2014 (updated June 2020) and the Care and Support (Charging and Assessment of Resources) Regulations 2014 set out the council's duties towards adults who require care and support and its powers to charge.
5. The Act says that, if a person needs residential care and their capital falls below the threshold of £23,250, they will be eligible for council-funding to pay for this. The council will carry out a financial assessment to determine if the service-user should pay a contribution towards the care charges.

Personal Budget

6. The council has a duty to assess adults who have a need for care and support. If the needs assessment identifies eligible needs, the council will provide a support plan which outlines what services are required to meet the needs and a personal budget which calculates the costs of those services.
7. The amount that the council calculates as the personal budget must be sufficient to meet the person's needs as detailed in the care and support plan.

The law states the personal budget must be an amount that is the cost to the council of meeting the person's needs. In establishing the 'cost to the council', consideration should therefore be given to local market intelligence and costs of local quality provision. This is to ensure that the personal budget reflects local market conditions and that appropriate care that meets needs can be obtained for the amount specified in the budget. To further aid the transparency principle, these cost assumptions should be shared with the person, so they are aware of how their personal budget was established.

Deferred Payments

8. The Deferred Payment Scheme is designed to help residents in care homes who have been assessed as having to pay the full cost of their residential care as they own property and have savings of less than £23,250 but are unable to make payments in full as their capital is tied up in their property. As part of the scheme a council enters into a contract with the care home to pay the difference between the assessed contribution and the full cost and places a charge on the resident's property to recover its costs later when the property is sold.

12-week property disregard

9. The council must disregard a person's property in the financial assessment for the first 12 weeks of a permanent care home placement.

Third-party top-up

10. If a person chooses a more expensive placement than the council will pay, someone must be willing and able to pay the difference between the amount the council will pay (including the resident's financial contribution) and the full cost of the placement for as long as necessary. This is called a 'top-up'. Normally a third-party such as a relative will pay the top-up.
11. The statutory guidance says:

Where a local authority is meeting needs by arranging a care home, it is responsible for contracting with the provider. It is also responsible for paying the full amount, including where a 'top-up' fee is being paid. However, where all parties are agreed it may choose to allow the person to pay the provider directly for the 'top-up' where this is permitted. In doing so it should remember that multiple contracts risk confusion and that the local authority may be unable to assure itself that it is meeting its responsibilities. (paragraph 8.33)

First-party top-up

12. A resident can pay their own top-up when they have joined the Deferred Payment Scheme, so the top-up can be added to the accruing debt and repaid once the property is sold.

Service-user contribution

13. While the statutory guidance allows for a top-up to be paid directly to a care provider, if everyone agrees to it, there is no provision for the assessed weekly service-user contribution to be paid to a care provider. As councils are responsible for paying the full amount of the fees to the care provider, we consider that councils should collect that money themselves.

Information and advice

14. Councils must provide information about the choices open to individuals and must explain a person's rights under the Care Act. This must include advice and

information to help people understand the charges so that they can make informed financial decisions.

The Council's policies and procedures

15. The Council expects residents to pay any top-up fees and service-user contributions directly to a care provider. It makes a payment to the care provider 'net' of (minus) these payments which is not in accordance with the statutory guidance.
16. The Council's deferred payments procedure says, once the Council has completed the financial assessment and the long-term care purchasing is in process, it sends out the deferred payments leaflet to the family. Once payments are confirmed and processed the Council signs an agreement with the care home and the Council releases payment. At that point the Council sends out an application form to the family.

How we considered this report

17. We produced this report after examining relevant documents and interviewing the complainant.
18. We gave the complainant and the Council a confidential draft of this report and invited their comments. The comments received were taken into account before the report was finalised.

What we found

Background: previous complaint and Ombudsman report

19. Mrs B previously complained to us about the actions of the Council in respect of her father's care home fees. We issued a public report in November 2017, finding fault in several areas, including the Council's failure to follow the Care Act to allow people to pay the top-up fee directly to the Council and for the Council to pay the whole amount of the fees to the care home. We recommended that the Council should bring its procedures in line with the Care Act to ensure people were offered the option to make these payments directly to the Council.
20. The Council did not comply with this recommendation, so we issued a further report in February 2020 requiring the Council to fully comply with our recommendations. We accepted that the Council had modified its payment arrangements to some degree, but they still did not comply with the Care Act: most importantly they still did not provide the protection of allowing third parties to pay the top-up fees directly to the Council. We did not consider the Council had acceptable reasons for departing from the guidance.
21. The Council informed us in October 2020 that it was changing its payment procedures in line with our original recommendations: the Council will pay care providers the whole amount of the fees and collect the top-up payments and service-user contributions from third parties. Its original reasons for departing from the statutory guidance no longer applied and it had improved its procedures in the intervening period which negated its original concerns.

What happened

22. Mrs C was living in her own retirement flat with a 24-hour package of care (provided by direct payments from the Council allowing Mrs C to purchase her own care, with help from her family). The Council had already carried out several financial assessments and sent Mrs C information about the process including how her property would be treated.

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23. In late 2019 Mrs C's needs increased, particularly at night and she had a stay in hospital. The family requested an increase in direct payments, but the Council considered residential care was more appropriate.
 24. In early January 2020, the Council and Mrs B discussed a temporary placement in a care home, identified by Mrs B (the Home) to see how Mrs C settled in. The Council discussed the financial implications if Mrs C went into residential care permanently: initially the Council would disregard the value of Mrs C's property. She could then agree to a deferred payment arrangement until her capital dropped below the capital threshold and the Council could assess her financial contribution. The case notes say that Mrs B had agreed with the Home that there would be no top-up fee.
 25. Mrs C fell on 5 January 2020 breaking her hip. Mrs B discussed the Home with the Council. Mrs B said that the Home was now saying that a top-up fee would be required, but the family could not afford to pay it. The Council advised again that the property would be disregarded for 12 weeks, then Mrs C could enter into a deferred payment arrangement until the property was sold. At this point the Council would invoice Mrs C for the fees that had already been paid and Mrs C would be self-funding (pay her own care fees) until her capital dropped below the threshold. The Council would then carry out a financial assessment and the question of the care home charging a top-up fee would arise again, unless the Home would agree not to charge a top-up fee. If not, the Council advised Mrs B to consider other homes so that Mrs C would not have the upheaval of moving once she had settled in.
 26. The Council discussed the fees with the Home: it said the weekly fee for long-term care was £900. The Council would pay £553 a week so there would be a shortfall of £347 a week owed to the Home at the end of the deferred payment scheme. The Home also said it expected Mrs C would be self-funding for two years and then it would waive the top-up fee once the Council took up the funding (i.e.. when Mrs C's savings dropped below £23,250).
 27. At this point Mrs B did not consider there would be enough money in the flat to cover two years of self-funding. She wanted reassurance that Mrs C would not have to move in the future. The Council advised her to look at alternative care homes which may be cheaper. It suggested a specific home in a different area, which Mrs B viewed. Mrs B said the family considered the alternative home could be a viable option but were persuaded by the Council to go back to the Home to make the finances work.
 28. Mrs C was ready for discharge in mid-January. The Council liaised with the Home about the fees: it required £880 a week. The Council also agreed to pay the top-up fee for the first 12 weeks as part of the deferred payment arrangement.
 29. The key worker discussed the payment arrangements with Mrs B and advised her to view the contract with the Home. Mrs B signed a contract with the Home agreeing a weekly cost including a first-party top-up and signed a direct debit to the Home for Mrs C's service-user contribution. The Council would pay the rest for the first 12 weeks and then Mrs C would sign a deferred payment agreement.
 30. Mrs C moved into the Home on 23 January 2020. On 4 February 2020 the Council confirmed to Mrs B that if Mrs C's funds did not last for two years the family would have to pay any subsequent top-up fee.

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31. The Council proceeded with the financial assessment and in March identified an error with the amount the Council said it would pay during the 12-week property disregard period. Mrs C also required nursing care from 31 March 2020.
 32. Mrs B says the Council sent out three sets of third-party agreement forms in April 2020 with different payment amounts. Mrs B queried the forms as the amounts were different and she understood it was a first-party, not a third-party agreement.
 33. The Home agreed to this arrangement on 11 May 2020 and the Council signed the three third-party agreements, covering the different rates over the 12-week disregard period and onwards. The Council had further discussions with the family about the top-up fee during the 12-week property disregard period. Mrs B sent an email to the Council on 12 May 2020 setting out her understanding of the situation (that the Council had agreed to pay the top-up fee during the initial 12 weeks) and asked for confirmation it was correct. She did not receive a reply.
 34. She also requested information about the deferred payment arrangement so the family could understand the process properly, but the Council said it needed the third-party agreement signed first.
 35. The Council sent a letter to Mrs B on 5 June 2020 clarifying the situation. It agreed to put a first-party agreement in place alongside a deferred payment agreement. Once Mrs C's property was sold, she would repay the fees to the Council. It said Mrs C should pay her service-user contribution directly to the Home.

Formal complaint

36. Mrs B complained to the Council on 21 June 2020. She said she had not received confirmation from the Council about the top-up arrangement for the first 12 weeks. She said the Home, on 13 April 2020, had taken a double payment out of Mrs C's bank account for her service-user contribution and was refusing to refund it until the Council has a contract in place. She complained that the Council had refused to intervene to get this back and had still not sorted out the paperwork with the Home.
37. Mrs B also highlighted that the Care Act states the following.
 - Contracts, charging and all financial matters must be clear, transparent and fair with sufficient information and advice to ensure people understood any contributions they needed to make.
 - The Council is responsible for contracting with the Home and for paying the full amount, including where a 'top-up' fee is paid.
 - The Council should have provided information and advice about deferred payment agreements during the 12-week disregard period, ready for a smooth transition at the end of this period.

First response

38. The Council responded on 10 July 2020, explaining the deferred payment agreement and the third-party top-up. But it now said Mrs B had agreed that Mrs C would pay the top-up during the first 12 weeks in addition to her service-user contribution. From week 13 the first-party top-up would be added to the deferred payment agreement. It explained that the third-party agreement forms covered a first-party agreement situation and that the figures varied due to the changes to Mrs C's level of care. Once these forms were signed the Council would provide full and accurate information about the deferred payment agreement.

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39. The Council said the double payment taken by the Home was frustrating and disappointing, but it was for Mrs B to resolve directly with the Home. The Council also acknowledged that it was considering changing its procedures to align with the Care Act: i.e.. to allow service-users to make payments to the Council rather than care providers, but at present Mrs C had to pay the Home directly.
40. Mrs B responded on 13 July 2020. She disputed the Council's view that she had agreed to pay the top-up for the first 12 weeks directly to the Home. She said the Council had agreed to pay the top-up from the date Mrs C moved into the Home until her property was sold. She also objected to the Council's refusal to intervene when the Home took a duplicate payment. She said this was a direct consequence of the Council failing to follow the Care Act and take responsibility for the whole payment to the Home.

Second response

41. The Council replied on 24 July 2020 clarifying that the Council had agreed to pay the top-up during the first 12 weeks and the debt would be added to the deferred payment agreement. It also said there was no need to sign a third-party agreement form as the detail would be included in the deferred payment agreement. It corrected the errors in the figures and confirmed that currently Mrs C would have to pay her service-user contribution directly to the Home.
42. Mrs B responded saying that she welcomed the clarification. But while some issues had been resolved (the Home had now refunded the duplicate payment), she still did not have:
- a copy of the contract between the Council and the Home;
 - information about the deferred payment agreement which should have been in place on 16 April 2020; and
 - any response as to why the Council's procedures still did not comply with the Care Act.

Third response

43. The Council responded again on 14 August 2020. It acknowledged it still had further work to do in making sure staff understood the difference between first-party and third-party top-ups. It said this lack of understanding in Mrs C's case had caused confusion to Mrs B. It also agreed it was important for the paperwork supporting the top-ups to be accurate. It proposed to make changes to the information it provided in its leaflets and to offer training to staff. The response also summarised the position with Mrs B's previous complaint to us and said it was currently reviewing its payment arrangements with a decision expected later in the year.
44. Mrs B remained unhappy and drew attention to another Ombudsman report where we had criticised a council for failing to take responsibility for the whole payment of fees to a care home (in this case the service-user contribution) even though this was not explicitly mentioned in the statutory guidance.
45. On 3 September 2020 the Council sent Mrs B a letter confirming the financial arrangements and enclosed information and an application form for the deferred payment agreement. It also sent her a copy of its contract with the Home. Mrs B queried the figures in October 2020 and said Mrs C had recently sold her flat subject to contract. The Council confirmed it had signed an agreement with the Home on 25 September 2020 and started to make payments on 5 October 2020, backdated to 23 January 2020. Given the sale, it said it would no longer proceed

with the deferred payment agreement but instead would require a solicitor's undertaking that the money would be paid back to the Council on completion of the sale. Mrs C would then become self-funding directly with the Home.

Final response

46. On 23 September 2020 the Council provided a final complaint response. It gave details of the planned meetings where the Council would discuss the review of its payment arrangements to care providers. It appreciated it had taken a long time but said we were fully aware of the Council's actions and the matter was now progressing to a conclusion. It apologised for the delay in providing the contract and the deferred payment agreement.

Ombudsman complaint

47. Mrs B then complained to us.
48. In response to our enquiries the Council acknowledged the following points.
- There had been some confusion in the information provided to the family before Mrs C's admission to the Home. It noted separate conversations were taking place between all three parties (the Home, the family and the Council) leading to different figures and scenarios being discussed. This caused confusion and regrettable delay.
 - It had not provided clear information to the family about the application of the top-up during the initial 12 weeks which led to delay in resolving and clarifying the financial position. It also gave incorrect information about this to Mrs B in its first complaint response.
 - The different lines of communication caused confusion as to the rate being charged for Mrs C's care. The first set of third-party agreement forms contained the Home's higher private rates rather than the Council's contracted ones. The Home queried the rates and new forms were produced. The Council acknowledged that if it was providing the accommodation for Mrs C, the only contractual arrangements should have been with the Council.
 - It had not explained to the family that Mrs C was included as an eligible resident in the third-party agreement form. This caused confusion and delay because Mrs B did not want to sign a third-party agreement for a first-party top-up. As a result of the complaint, it was reviewing its written agreements and looking at ways to ensure staff, residents and family members better understand the top-up arrangements.
 - The prolonged discussions over the top-up arrangements had delayed the completion of the contract agreement with the Home which in turn delayed the provision of information about the deferred payment agreement.
 - It should have intervened sooner to resolve the duplicate payment the Home had taken, and it had already apologised for the failure to do so.
 - On 14 February 2021 it provided Mrs B with a redemption figure for the amount to be repaid from the sale of Mrs C's property.
49. In summary it accepted that the service Mrs B received was poor. It also noted with regret that this was the second time Mrs B had complained about the same financial issues, which had caused her time and trouble in pursuing the matter. The Council misadvised Mrs B at points, failed to provide timely and correct information and failed to take responsibility for negotiations with the Home. It

considered that when the Council implements its new payment arrangements, most of the issues Mrs B experienced will be resolved.

50. In October 2020 it had set up a Task and Finish Group to review and improve the customer experience for people dealing with financial issues for family members. It had updated its finance fact sheets, reviewed the whole process, and was developing a first-party top-up form along with a flow chart of the processes and people involved in setting up a deferred payment agreement for staff and service users.
51. In addition to the procedural improvements, it offered Mrs B:
 - a further formal apology;
 - full reimbursement of the fees she incurred (£600) in relation to the deferred payment agreement (rather than a pro rata refund); and
 - £300 in recognition of the time, trouble and distress she has experienced.
52. Mrs B says she did not incur any fees as the deferred payment agreement was never set up.

Issues following completion of sale

53. The sale of Mrs C's flat completed at the end of February 2021. The Home has confirmed a higher weekly rate for Mrs C to live there on a self-funding basis, than it mentioned in the original contract Mrs B signed in January 2020. Mrs B says Mrs C cannot afford this. The family have found another home which has caused Mrs C significant upheaval and distress.
54. Mrs B believes this situation has arisen due to the Council's poor handling of the original care fees last year. She says she trusted the care home manager who said that if Mrs C committed to paying at least two years of fees at the rate of £880 or £950 (depending on the level of care needed) then Mrs C could stay there on the reduced Council rate once her savings dropped below the threshold. She says if she had known this situation might arise, she would have looked for a cheaper home.

Conclusions

Advice and information before the start of care

55. The Council accepts that the information it provided to the family before Mrs C's admission to the Home was confusing; particularly because discussions were taking place between the three parties and different figures/arrangements were discussed.
56. The case records show that the Council did offer some explanations in conversations with Mrs B about how the deferred payment arrangement would work. But it failed to follow this up with clear written information, setting out the position in advance and including the 12-week disregard period, so Mrs B could make an informed decision about Mrs C's care. This was fault which caused Mrs B confusion and uncertainty at a difficult time.
57. There is evidence the Council suggested Mrs B should consider alternative care homes and provided one specific alternative which the family explored. But given the confusion over the fee arrangements, Mrs B did not fully understand the consequences of accepting a place at the Home. She clearly stated she did not want Mrs C to have to move in the future, but this is exactly what happened due to the lack of clarity over the level of fees once Mrs C became self-funding. The

lack of clarity at a crucial point was fault which contributed to Mrs C having to move to an alternative home a year later.

Responsibility for paying the care charges

58. If the Council had taken responsibility for payment of the full charges (including the service-user contribution and top-up fees) in accordance with the Care Act guidance and the recommendations in our previous report, the Council alone would have agreed the level of fees with the Home and relayed the information to Mrs B. The failure to do so was fault. Mrs B would have been saved the confusion of negotiating a contract with the Home, including unhelpful speculation about how long Mrs C might be self-funding and whether the Home would require a top-up fee. The involvement of the Home in this negotiation was particularly inappropriate and resulted in the Home being party to significant financial information about Mrs C which was not its concern. If the Council had taken control of the whole payment, it would also have prevented the prolonged confusion over the weekly rate for Mrs C's care and the Home taking too much money for Mrs C's service-user contribution.
59. The Council has acknowledged it should have intervened when the duplicate payment was taken and has apologised for not doing so. This caused Mrs C financial loss over a period of three months and Mrs B significant time and trouble in chasing up the Home.

Providing clear and consistent information in a timely fashion

60. The Council also accepts it failed to provide clear and consistent information to Mrs B about the application of the top-up during the initial twelve-week disregard period. It was not until July 2020, seven months after Mrs C had moved into the Home, that the Council confirmed unequivocally and in writing that it would pay the top-up fee for the initial twelve weeks. This was fault which caused Mrs B confusion and frustration. It also contributed to the prolonged delay in resolving the financial position.
61. The Council recognises it caused further confusion and delay by failing to explain to Mrs B that Mrs C could sign the third-party agreement forms, even though she was making a first-party top-up. It delayed for four months in sending the agreement forms, and then exacerbated the confusion by sending three copies of the form with different and inaccurate figures, with no explanation. The whole situation was not clarified until August 2020. This was fault. The delay caused Mrs B significant frustration, inconvenience and time and trouble in communicating with the Council.

Acknowledging fault causing injustice

62. We welcome the fact that the Council has acknowledged the multiple instances of fault causing injustice in this case and expressed regret that it is the second time Mrs B has had to complain about similar issues.
63. However, the most significant point it has acknowledged is that once it implements its new payment arrangements, most of the issues Mrs B has experienced will be resolved. It follows that, had the Council complied with our recommendations following our first report in November 2017, within a reasonable timescale, Mrs B would not have had cause to complain for a second time.
64. This is a clear example of the consequences of the Council refusing without good reason to comply with our recommendations. We hope the Council reflects on this for future cases.

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65. We are also concerned that despite the Council's agreement in October 2020 to finally bring its payment arrangements in line with the requirements of the legislation and guidance, it has still not implemented the changes, so residents are continuing to make their own payments to care providers. We expect this process will be concluded shortly.

Impact of property sale and repayment of debt

66. The Council advised Mrs B from the outset that once Mrs C's flat had sold she would pay the charges accumulated under the deferred payment arrangement and pay the ongoing care charges on a self-funding basis.
67. We agree that the situation was confused and unclear in January 2020. We also recognise that if the Council had taken responsibility for negotiating the cost of the placement, Mrs B may well have made a different decision at the outset. But we do not consider the Home's decision to increase the care fees now is due to fault by the Council. The decision on the level of care fees is one for the Home to make and is not within the control of the Council. There are also many other factors which could affect the level of payments, outside of the discussions made the previous year.

Recommendations

68. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)
69. We welcome the Council's offer to take action to put matters right. However, we consider the payment to Mrs B for her time and trouble should be higher, given that this is the second time she has complained and the situation was largely avoidable had the Council complied with our recommendations from the previous report.
70. To remedy the injustice identified in this report we recommend the Council should within three months of the date of this report:
- provide a further formal apology in writing to Mrs B;
 - pay £600 to Mrs B in recognition of the time, trouble and distress she has experienced; and
 - complete the changes to its payment processes in line with our previous recommendations, as a matter of urgency and report back to us once it has done so.

Decision

71. We have completed our investigation into this complaint. There was fault by the Council which caused injustice to Mrs B. The Council should take the action identified in paragraph 70 to remedy that injustice.

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